In the Supreme Court of the United States

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

CITY OF WHEELING, OHIO,

Appellee.

BRIEF FOR APPELLANT, THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY.

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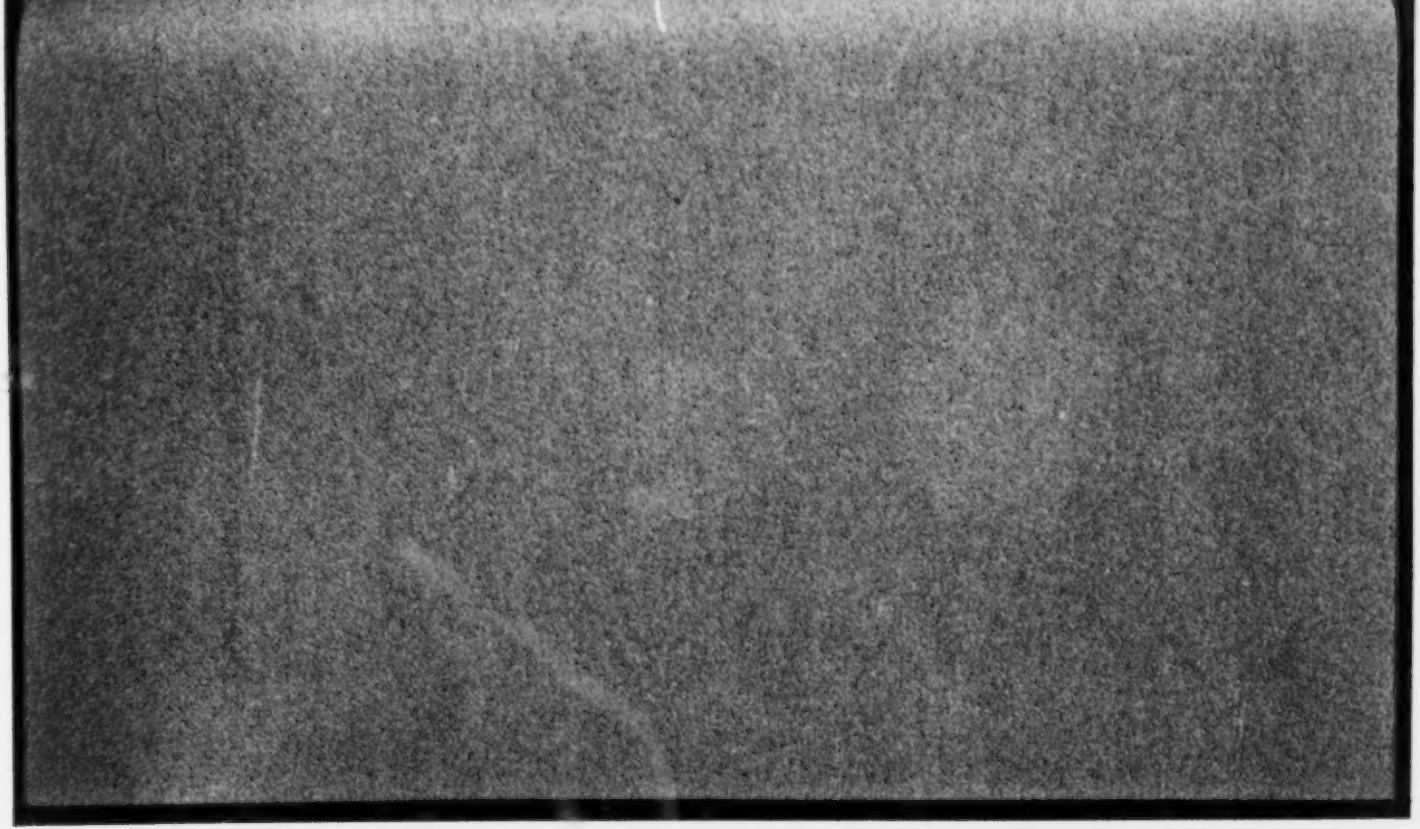

No. 229.

In the Supreme Court of the United States

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The United States of America, The Steubenville, East Liverpool & Beaver Valley Traction Company, and Interstate Commerce Commission,

Appellants,

vs.

City of Wellsville, Ohio,

Appellee.

BRIEF FOR APPELLANT, THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY.

STATEMENT OF THE CASE.

The Steubenville, East Liverpool & Beaver Valley Traction Company, defendant below, is an electric interurban railway operating over a distance of some forty miles in eastern Ohio and western Pennsylvania. It operated in and through certain municipalities—including the appellee, the City of Wellsville, under franchises which fixed the rates that should be charged for passenger transportation. The result being that this appellant was unable to increase its intrastate passenger fares to the level charged for interstate traffic. Upon investigation in a proceeding instituted by the Interstate Commerce Commission upon petition filed, the Commission, after hearing, found that the interstate rates and fares

of this appellant as contained in its tariff on file with said Commission were just and reasonable and that the lower intrastate rates had the effect of practically denying to the company the use of its interstate fares. (For report of the Commission see Record pages 7 to 15 inclusive.) Thereupon the Commission made and issued its order

> "that the Steubenville and East Liverpool and Beaver Valley Traction Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between points on its line within the State of Ohio found in said report to be just and reasonable for the future."

Whereupon the City of Wellsville, Ohio through which this appellant operated its railway, filed its complaint in the United States District Court for the Northern District of Ohio, Eastern Division, praying that appellants be enjoined from enforcing such order so made by the Interstate Commerce Commission. Upon the issues made in said suit hearing was had before Hon. Maurice H. Donahue, Circuit Judge, Hon. John M. Killits and Hon. D. C. Westenhaver, District Judges, first upon an application for temporary injunction which was granted and afterwards submitted under a "stipulation for record for final hearing" (Record p. 67). Whereupon final decree was entered permanently enjoining and restraining appellants from putting into effect said order of Interstate Commerce Commission, to which each appellant objected and excepted. To review this decision the cause was brought into this Court by appeal from said final decree so entered by the District Court.

The District Court upon the pleadings, findings and order set forth on page 67 of the Record, found that the appellant is not a "railroad" within the meaning of Section 1 of the Act to regulate commerce, on the grounds (I) That the case of *Omaha and Council Bluffs Street Railway Co. vs. The Interstate Commerce Commission,* 230 U. S. 324 and the various amendments to the Act to regulate commerce indicate that such section applies, so far as interurbans are concerned, only to those engaged in the general transportation of freight or operated as a part of a general steam system of transportation and (II) that this appellant is not engaged in the general transportation of freight (it being admitted that it is not a part of a general system). These bases will be taken up in inverse order.

I.

We agree with the District Court (page 36) that "The Interstate Commerce Commission's findings of facts * * * are conclusive upon this Court if supported by substantial evidence." The Interstate Commerce Commission found as a matter of fact (page 8) that

> "A *daily freight service* is maintained between Steubenville, Ohio, and Midland, Pennsylvania, and a *through car runs from Steubenville to Beaver, Pennsylvania,* * * * as often as the traffic demands, which at the time of hearing was about once a week.
>
> "At Vanport the Traction Company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh and Lake Erie Railroad at Beaver." (Italics ours)

There can be no disagreement concerning the "substantial evidence" which supports these findings. The

District Court does not say that the evidence before the Commission was insufficient to support the assertion that the appellants maintain a daily interstate freight service. It held however, that such a daily freight service was not engaging "in the general business of transporting freight" because (a) the freight was usually in less than carload lots and (b) it amounted to a small percentage of the gross earnings of the Company.

We submit that in determining whether or not a Company is engaged in the general business of transporting freight, the criterion should be *regularity of service* rather than the volume of freight carried. If the District Court's criterion be correct, where shall the line be drawn? We do not believe that Congress ever intended such a distinction to be made. If it had, it certainly would have indicated, in a general way at least, the percentage of freight income necessary to class a carrier as a railroad. On the other hand, our view seems to be supported by the literal meaning of the terms "general transportation of freight." *The word "general" has no connection with volume.* On the contrary, the connotation is this: that the carrier is generally prepared, i. e. prepared at all times—to accept and transport freight in general—i. e. freight of all kinds. This the appellant was prepared to do. It held itself out as a general carrier of freight; it maintained a *daily* freight service.

In *United States vs. B. & O. Southwestern Ry. Co.*, 226 U. S. 14, the appellant was "an interurban electric railway for passengers and *some* freight." This case will be adverted to later and it is enough to say here that if the District Court's criterion be correct, this Court in that case should have examined into the *percentage of freight* carried by the appellant. It does not appear that it did so.

II.

Assume however, that the appellant is not engaged in the general transportation of freight. The lower court decided that it is not a "railroad" within the meaning of Section 1 of the Act and based this conclusion on the following grounds:

(a) The *Omaha* Case. (*supra*)

(b) The amendments of 1910 and 1920 to the Act to Regulate Commerce which—in respect to Sections 1 (Paragraphs 18 to 22), 15, 15a and 20a—expressly exempt certain interurbans from the jurisdiction of the Interstate Commerce Commission.

(c) The general plan of government regulation of carriers.

(a) The Omaha Case.

The appellant in the *Omaha* Case (230 U. S. 324) was strictly a street railway; it was confined to the boundaries of a single municipal community (artificially divided by a state line); it carried no freight whatever; its tracks were laid in the public streets; its stations were the street corners; its field of activity was to "aid *street* traffic * * * for the use of a single community."

In the instant case on the other hand, the Commission found as a fact that

> "Whatever may have been the original service afforded by the respective railways at the time of their merger, the Traction Company is now carrying on *much more* than a street railway business. In its interurban operations it now assumes the status of an electric railway and as such is engaged in interstate transportation." (Italics ours)

The facts in the *Omaha* case (as noted by Mr. Justice Lamar) are fundamentally different from the case now before the Court where we have

> "* * * a new type of interurban railroad * * * with electricity as a motive power, using larger cars and running through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed. *We are not dealing with such a case* * * *." (Page 337, Italics ours)

(b) Amendments to the Act to Regulate Commerce.

After the passage of the original Act in 1887 the Interstate Commerce Commission assumed jurisdiction over electric railways including those whose sole business was the transportation of passengers and incidentally express (7 I. C. C. 83—13 I. C. C. 20—20 I. C. C. 406—20 I. C. C. 486). This assumption of control was apparently unchallenged for it was said in the *Omaha* Case in 1912 by the Government Counsel arguendo "* * * there are now in the public records of the Commission between 3,000 and 4,000 electric railway tariffs." (Page 332).

Can it be possible that Congress in enacting the amendments of 1910 and 1920 did not know that at that time the electric passenger railways were *in fact* subject to the powers of the Commission? And certainly after the question was noticed in the *Omaha* Case (where it was queried by way of a dictum whether or not the new type of interurban should come under the Act), after that case the legislators must have been familiar with the question. They must have known that after the *Omaha* Case, the Commission continued (as a matter of fact) to exercise jurisdiction over all electric interurbans engaged in interstate commerce.

In the face of these notorious facts what did Congress do in enacting the amendments of 1910 and 1920? If it had desired to indicate that independent passenger railways should not come within the jurisdiction of the Commission, it could very easily have said

> "Passenger interurbans not operated as a part of a general system of steam railroads shall be excepted from the provisions of *all parts* of this Act."

Instead of saying that Congress has in respect to four sections of the Act indicated that *these particular sections* shall not apply to such interurbans. *For each of these exceptions there is a reason* and the correct conclusion, we submit, is that Congress intended that the Commission should continue to exercise such jurisdiction as it was in fact then exercising under the original Act, but should not assume the additional powers conferred by certain portions of the amendments, to-wit: Section 1, Paragraphs 18 to 22, and Sections 15, 15a and 20a.

(i) Section 15, Paragraph 3.

In 1910 the powers of the Commission were enlarged to permit it thereafter whenever it deemed it advisable in the public interest, to establish through routes, classifications, rates, changes, etc. (Section 15, Paragraph 3). From the operation of this particular paragraph independent passenger railways were expressly exempted. Why? This amendment is concerned solely with *through* traffic; the words are: "* * * shall establish *through* routes, *joint* classifications and *joint* rates, fares or charges * * *." In view of the short extension and local character of the business of independent passenger interurban lines, the establishment of *through*

routes and rates would have very little practical application to them and it is not difficult to understand why Congress should desire not to impose upon an already overburdened Commission the additional task of establishing through routes and rates for the hundreds of interurbans then (in fact) under its jurisdiction.

(ii) Section 15a.

Similar considerations apply to Section 15a of the Act. This section (enacted 1920) provides for what is popularly called the government guarantee to railroads and with other statutes was enacted to untangle the complications incident to Federal control and to ward off the chaos that threatened to spring up when the railroads were returned to their owners. The government had controlled absolutely the property and finances of most of the roads and it was the intention of Congress to give these roads fair play and to furnish the weaker lines temporary support upon their return to their owners. Since independent passenger interurbans had never come under federal control, there was no need to include them under the provisions of this section and their exemption from these provisions is not sufficient basis for the innuendo read into it by the District Court.

(iii) Section 20a.

The same considerations apply to the exception set forth in Section 20a, a section enacted in 1920 which deals with railway securities and gives the Commission plenary powers over their issue. In the financial uncertainty following the termination of federal control, it was necessary that those roads affected thereby should be under government financial supervision, especially so when such roads

were operated under an arrangement whereby their earnings were to some extent guaranteed by the government and whereby they were required to contribute under certain circumstances to a reserve fund. In view of the purpose of this section, there is no mysterious and hidden meaning in the clause which exempts independent passenger interurbans from its operation. They received no government guarantee; they made no contributions to a reserve fund. There was, therefore, not the necessity for government supervision of their security issues; and to have given the Commission this additional jurisdiction would have placed upon its shoulders a heavy and useless burden which might have hindered it in accomplishing the main purpose of this section.

(iv) Section 1, Paragraph 22.

The fourth notice in the amended Act of independent passenger interurbans is found in Section 1, Paragraph 22 (enacted 1920) which provides:

> "The authority of the Commission conferred by Paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of * * * interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The reason for this is clear and underlies the discussions in the Senate debates on the merits of the bill (Cong. Rec. 66th Cong. S. B. 3381). Under the "reconstruction" plans of 1920 the government agreed to guarantee to some extent the earnings of those railroads which had been under federal control. It was quite essential that *such* roads should be supervised in respect to the construction and extension of new lines. Otherwise the strong roads—limited in the percentage of earnings

which they could retain—and the weaker roads—assured of extrinsic financial aid—might embark on unprofitable extension programs for ulterior motives and the whole system of guaranteeing earnings might suffer, indeed collapse. It was to remove this possibility that the amendment now known as Section 1, Paragraphs 18 to 21 inclusive was enacted.

The independent passenger interurban however, had not been under government control; *they received no guarantee of earnings* and it therefore was neither necessary nor within the purpose of the amendment to include them; hence Paragraph 22, Section 1.

(v) Transportation Act of 1920.

As the District Court observed the foregoing references constitute the sole mention of interurbans in the Act to regulate commerce and its amendments. In the Transportation Act of 1920 two similar references occur in Sections 209 and 300. The latter concerns the establishment of the Railroad Labor Board and the former, the establishment of guaranty provisions *for those lines which had been under government control.* Enough has been said in previous paragraphs to show that all this legislation of 1920 was for the purpose of covering the difficulties surrounding the transition of the federally controlled roads back to their owners. The Transportation Act is made expressly to apply to roads under federal control, and therefore its provisions were never meant to apply to those independent passenger interurbans under consideration in the present case.

In addition the terms themselves of Section 300 imply a conclusion contrary to that reached by the District Court. Paragraph 1 of that section provides:

> "The term 'carrier' includes any * * *carrier by railroad subject to the Interstate Commerce Act except * * * an interurban railway not operating as a part of a general steam railroad system of transportation."

This statement seems to imply that interurbans not operating as a part of a general steam railroad system are within the terms of the Act.

This Court in deciding an analogous question has held

> "Exceptions from the general policy which the law embodies are to be strictly construed and are to be so interpreted as not to destroy the remedial purpose intended."
>
> "The exception contained in S. 6 of the Safety Appliance Act of March 2, 1893 as amended * * * exempting from its operation cars which are used upon street railways does not exempt cars used in regular interstate traffic which are also to some extent used on street railways. Such cars are covered by the general provisions of the statute."
>
> *Spokane and Inland R. R. vs. United States*, 241 U. S. 344.

III.

The foregoing examination, we submit, shows that the District Court has rested its decision on untenable grounds. The *Omaha* Case (*supra*) is not in point; the exemption of independent passenger interurbans from certain amendments to the Act is in every case explained by the purpose of the enactment. In the light of the circumstances surrounding each amendment, the weakness of the contention that these specific references to independent passenger interurbans were

> "inserted out of an abundance of caution and to repel the implication that the word 'railroad' as used in Section 1 *did* include"

a carrier like the appellant (page 41) is apparent. Congress at the time of these amendments must have known that the Interstate Commerce Commission was *in fact* exercising jurisdiction over hundreds of independent passenger railroads. *And if the Act did not already apply to independent passenger interurbans, there was no need to exempt them specifically from the provisions of these amendments.* If Congress were so imbued with caution, as the lower court suggests; if it really intended that the Commission should not control these lines, why did it not adopt the simple and obvious method and say, "independent passenger railways shall not be subject to *any* of the provisions of this Act." Instead it has specified a *few instances*—every one of which is based on reasons not noted by the District Court—in which the Act shall not apply to them. This indicates clearly, we believe, that, in the mind of Congress, the Act as a whole covers and controls the appellant and lines of its class.

Apparently this same view was held by this Court in deciding the case of *United States vs. B. & O. Southwestern Ry.*, 226 U. S. 14. There the appellant was running an "interurban * * * for passengers and *some* freight" in intrastate transportation; appellees were parallel steam roads with which the appellant sought switching connections under the provision of Section 1, Paragraph 9 of the Act to Regulate Commerce which provides that connections shall be made upon the application of any *lateral branch line of railroad.* The decision was against the appellant because it was not a *branch* line. In other words, it was assumed both by the court and by counsel that the appellant was a *railroad* in the meaning of Section 1 of the Act. If it was a "railroad," then it clearly came within Section 1a which reads:

> "The provisions of this Act shall apply to common carriers engaged in the transportation of passengers for profit wholly by railroad * * *."

True the proportionate amount of freight carried by the Cincinnati and Columbus Traction Company does not appear from the report, but it seems fair to assume (since it is the same sort of a line as the appellant is) that its freight business bore a similar ratio to its passenger traffic.

In addition, as noted by the District Court (record 45), this Court has held that under the Employers Liability Act and the Safety Appliance Act the term "railroad" includes independent passenger interurbans. The lower court explains this by saying that these two statutes are remedial and should be liberally construed. We submit that this difference should not be extended so as to make "railroad" mean one thing in one Act and another thing in another Act. The function of the courts in interpreting all three Acts is to give effect to the expressed intention of Congress. What basis is there for holding that Congress did not use the term "railroad" in the same sense in all three Acts?

Again the District Court assumes that the original Act was passed for the sole purpose of combating the evil of "pooling, rebating and discrimination" (page 45). We believe however, that the Act with its amendments has a far wider purpose: the complete control of interstate commerce carried by railroads in order that the people of one state may have reasonable access by railroad to another state without the burden of local control. This view is supported by the strong language of Section 13 of the Act (passed 1910 and re-enacted 1920), Paragraph 4 of which provides:

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Does Congress intend that the people of Pennsylvania in pursuing their right to travel and send goods over appellant's line into Ohio shall be thwarted by a local ordinance of the Village of Wellsville? Is interstate commerce any less the concern of Congress because it is moved by electricity instead of steam? The answer lies in the quotation just given which indicates that the intention of Congress is to give the federal authorities the fullest control over interstate commerce.

IV.

We submit therefore, that the District Court erred in its decision holding that the appellant is not subject to the jurisdiction of the Interstate Commerce Commission because (1) it is engaged in the general transporta-

tion of freight and (2) even if not so engaged the language of the Act and the specific exceptions in Sections 1, 15, 15a and 20a together with Section 13 show that Congress intended the Commission to have jurisdiction.

This conclusion is supported by decisions of this Court in the case of *United States vs. B. & O. Southwestern Ry.*, 226 U. S. 14; in the case of *Spokane & Inland Railroad Co. vs. United States*, 241 U. S. 344, and in cases noted in the opinion of the District Court (Rec. 45) involving the Safety Appliance Act and Federal Liability Act (See *Kansas City vs. McDow*, 240 U. S. 51; *Spokane and Inland R. R. Co. vs. Campbell*, 241 U. S. 497.

Respectfully submitted,

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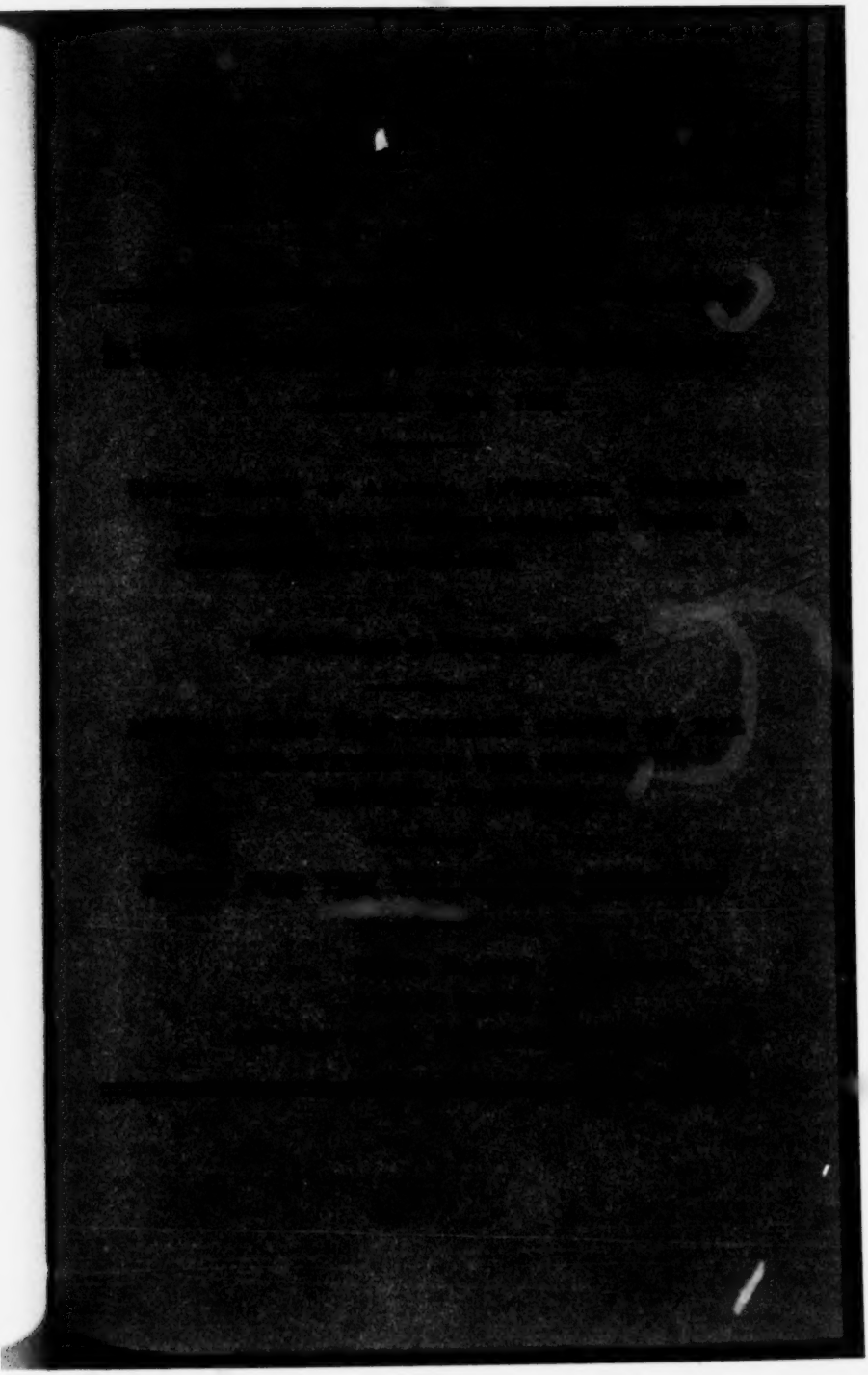

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In the Supreme Court of the United States

OCTOBER TERM, 1923

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, APPELLANTS,
v.
THE VILLAGE OF HUBBARD, OHIO. } No. 228.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE VILLAGE OF HUBBARD

HISTORY AND STATEMENT

The Village of Hubbard is located in Trumbull County, Ohio, about mid-way between Sharon, Pennsylvania, and Youngstown, Ohio; Youngstown being 8.75 miles westwardly from the east limits of Hubbard, and Sharon, 7.18 miles eastwardly from the west limits of Hubbard.

In 1901, a franchise ordinance was passed by the Village of Hubbard, and accepted by The Youngstown & Sharon Railway Company, which provides for the

maintenance between Hubbard and Youngstown of a cash fare of 12 cents, and between Hubbard and Sharon, a cash fare of 13 cents. Between Hubbard and both cities the franchise requires the sale of round-trip tickets at the rate of 20 cents for a single ticket, special tickets, good for 22 rides, for $2.00, and 54 commutation tickets for $3.80. This franchise expires on January 1st, 1925.

In 1917, the Grantee was merged with several other corporations, under the name of the Mahoning & Shenango Railway & Light Company. This name was, in 1920, changed to Pennsylvania-Ohio Electric Company. On November 21st, 1920, a new corporation, the Pennsylvania-Ohio Power and Light Company, one of the appellants, was organized to take over and operate the Youngstown and Sharon line.

The line thus acquired by such appellant, and now operated by it, is located wholly within the State of Ohio, and extends from Youngstown, Ohio, to the Ohio-Pennsylvania State Line. By traffic arrangement with the Shenango Valley Traction Company, it operates its cars from the State Line, a distance of about one mile, over the tracks of the Shenango Valley Traction Company. For a distance of nearly a mile and a half within the Village of Hubbard, the street railway operates over the streets of that village, and a considerable portion of its tracks outside of the village is laid on the public highways.

Effective February 15th, 1920, such Mahoning & Shenango Railway & Light Company, then the owner and operator of such appellant's line, by a tariff filed with the Interstate Commerce Commission, increased,

in defiance of its said franchise contract, its one way fare between Hubbard and Sharon to 20 cents, the price of a 54 trip commutation ticket to $5.00, and cancelled the round-trip and special tickets between such points.

Having thus violated its contract, the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, filed with the Interstate Commerce Commission a petition, alleging the discrimination which it, itself, had thus created, and praying for an order:

> "Forbidding all preferences and discriminations by requiring the establishment by the petitioner of *intrastate rates,* fares and charges, within the State of Ohio for the *intrastate transportation* of passengers, that will remove such advantage, preference, prejudice or discrimination, the said ordinance of the Village of Hubbard, the laws of the State of Ohio, or the decision or order of the said Public Utilities Commission of Ohio to the contrary notwithstanding." (Italics ours.)

The Interstate Commerce Commission did not see fit to remove the alleged discrimination by directing the petitioner to restore the rates provided for under its contract, but, on the 7th day of November, A. D. 1921, ordered:

> "That the Pennsylvania-Ohio Power & Light Company be, and it is hereby notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger

> fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents, when paid in cash, and $5.00 for 54 rides, when a commutation ticket for this transportation is purchased."

Prior to filing its petition, requesting the Interstate Commerce Commission to order it to violate all *its* contract obligations to the Village of Hubbard, while retaining all the privileges granted by the Village to it, the Mahoning & Shenango Railway & Light Company, the predecessor of the appellant, had made application to the Public Utilities Commission of Ohio for permission to increase its rates, which permission had been denied by the Public Utilities Commission; whose action, upon error, was affirmed by the Supreme Court of Ohio. *Mahoning & Shenango Ry. & Lt. Co. v. The Public Utilities Commission,* 98 O. S. 303.

The Village of Hubbard filed a bill in equity against the appellants in the District Court of the United States, for the Northern District of Ohio, to restrain the putting into effect of the rates provided for in such order of the Interstate Commerce Commission. Upon hearing before the statutory court, in such case made and provided, a permanent injunction was granted as prayed for.

In the Commission's report, it is said:

> "Petitioner is also engaged in the transportation of freight as will be later explained."

Later in the report, the facts in this regard are stated. The Street Railway has two connections, one direct at Masury and the other over a private siding at

Stop 41 (both between Hubbard, Ohio, and the Ohio-Pennsylvania State Line) with the New York Central Railroad. *It does not originate and deliver freight traffic over the New York Central Railroad,* but, in the two years—1919 and 1920—922 cars of freight were *received* by it from that line for delivery chiefly at points on such appellant's line. Such appellant also operates a daily less-than-carload freight and parcel package service between Youngstown and Sharon, and three days each week operates a through car for such service from Sharon, in Pennsylvania, to New Castle, Pennsylvania. This through car, it will be noted, is loaded and unloaded wholly outside of the State of Ohio, and for the greater portion of the distance, is operated wholly outside of the State of Ohio and over a Street Railway line, not owned by such appellant.

In 1919, the less-than-carload freight amounted to 6,240 tons, which produced a revenue of $18,000.00, and the carload and switching revenue was $6,246.52. In 1920, the less-than-carload freight was 5,474 tons and produced a revenue of $21,221.00. The carload and switching traffic yielded $5,259.00. The passenger revenue receipts for 1920 were $332,173.43.

Thus, it will be seen that the total amount of revenue received from all kinds of freight and express service, as well as switching charges, was about seven per cent. of the total revenues of the Street Railway. The gross revenue derived from switching cars from the New York Central was one and one-half per cent. of the total gross revenues.

It is to be borne in mind also, that no outgoing freight over the New York Central originates with such

appellant; that there is no interchange or division of freight rates between such Railroad and such Street Railway; *and that demurrage on the incoming cars delivered by the New York Central begins to run when placed on the Street Railway's siding.* So that, in that regard, the Street Railway acts only as agent for the consignee and, so far as the Railroad is concerned, delivery to the consignee is complete when the cars are delivered to the Street Railway Company. The record shows also that all cars so delivered are returned empty to such Street Railway siding, there to be picked up by the crews of the New York Central.

ARGUMENT

The appellants contend that the injunction in this case should not have been granted, for two general reasons:

A. That the village of Hubbard was not a proper party plaintiff in the District Court;

B. That the Interstate Commerce Commission had jurisdiction of the subject matter covered by the order of November 7th, 1921.

A.

WAS THE VILLAGE OF HUBBARD A PROPER PARTY PLAINTIFF?

1. Paragraph 1, of section 13, Interstate Commerce Act (Comp. St. Sec. 8581), authorizes any "body politic or municipal organization," to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. Paragraphs 2 and 3, of such section, as amended June 18th, 1910, and February

28th, 1920, confers upon the Commission full power and authority to institute inquiries, on its own motion or on the petition of any carrier, into any rate or fare made or imposed "by authority of any state."

Under the statutes of the State of Ohio, as they stood at the time the franchise in question was granted, full and exclusive authority was delegated to the municipality granting the franchise to any street railway to determine the rates to be charged by such street railway.

It is the law of Ohio that such franchise grants are contracts binding upon both parties, and that the State of Ohio may not impair the obligation thereof. Where such franchise fixes the rate of carriage beyond the limits of the municipality granting it, it is within the power conferred upon municipalities by the Legislature of Ohio, and is valid and binding between the parties to it.

Interurban Ry. etc., Co. v. City of Cincinnati, 93 O. S. 108;

Interurban Ry. Co. v. Public Utilities Commission, 98 O. S. 287;

City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517;

Columbus Ry., Power & Light Co. v. Columbus, 249 U. S. 399.

It follows, therefore, that the rates prescribed by such franchise are rates "imposed by authority" of the State of Ohio. Obviously, also, from a consideration of the entire section, if a franchise contract made by a municipality with a carrier is the basis of the inquiry, that municipality should be made a party and be given an opportunity to be heard; and, if so, it has the same

right as any other party in interest to seek redress against an erroneous or unlawful order of the Commission. In the instant case, the village of Hubbard was made such a party to the proceeding before the Commission, entered its objections to the jurisdiction of the Commission to raise rates, and was heard upon such objection.

2. The statutory court in its opinion, *Village of Hubbard, Ohio, v. United States, et al.*, 278 Fed. 754, 759, 760, also adds this observation:

> "It has long been the practice to permit representative associations and exchanges to institute and maintain proceedings before the Commission and to be heard in court against its orders. See Judson on Interstate Commerce, (3d Ed.) § 437. In *City of New York v. United States et al.* (D. C.) 272 Fed. 768, a municipal corporation, the city of New York, was the party plaintiff, and, although relief was denied on the merits, it was expressly held that the city's interest was such as entitled it to maintain the action."

3. In Ohio, municipal corporations, when parties to a franchise contract, are authorized to bring proceedings to enjoin its violation, or to enforce its terms.

> *G. C.* § 4311, 4312;
> *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414, 421-23;
> *City of Springfield v. Springfield Gas Co.*, 12 Ohio C. C. (N. S.) 392, affirmed without report, 81 O. S. 537.

If the order of the Commission is *valid*, it is an effectual bar to the prosecution of any such action by the Village of Hubbard. If it be *invalid*, the determina-

tion of its invalidity is a necessary condition precedent to the effective prosecution of any action, either to enjoin a violation of the terms of the franchise, to enforce such terms or to secure its forfeiture.

If a municipality has no right to attack an invalid order of the Interstate Commerce Commission affecting a franchise contract theretofore entered into between such municipality and a street railway, then it is left wholly without remedy to prevent the street railway from exercising all the privileges *granted* by the franchise to *it* while refusing to comply with the conditions and obligations *imposed* by the *municipality* for the exercise of such privilege.

4. In the late case of the *State of New York, et al., v. United States, et al.*, 257 U. S. 591, this Court, while it affirmed the action of the District Court in dismissing the original bill, seemed to have had no question that the State of New York was a proper party. The status of the Village of Hubbard, as party plaintiff in the case below, seem to us analogous to that of the State of New York in the case cited.

5. Section 1, of the Commerce Court Act, 36 Stat. L. 539, in providing for the jurisdiction of such court, reads:

> " • • • Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission."

Section 5, of such Act, reads:

> " • • • *Provided further*, that *communities* • • who are interested in the controversy or question before the Interstate Commerce Commission, or *in any suit* which may

> be brought by any one under the terms of this Act, or the Acts * * which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors *may prosecute, defend or continue said suit or proceeding unaffected by the action or non-action of the Attorney General of United States therein.*" (Italics ours.)

By the terms of the statute abolishing the Commerce Court (38 Stat. L. 219), the jurisdiction formerly vested in said court was transferred to the several district courts of the United States. The Act provides:

> "The procedure in the District Courts in respect to cases of which jurisdiction is conferred upon them by this Act, shall be the same as that heretofore prevailing in the Commerce Court."

If an interested community has the right to intervene in any suit or proceeding brought by the Attorney General to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission, and has the right to prosecute or defend said suit or proceeding "unaffected by the action or non-action of the Attorney General", how can it be logically contended that such interested community has not the right in the first instance to bring an action for that purpose?

Surely it cannot be contended that the incorporated Village of Hubbard, which was made a party to

the proceedings before the Commission, and which had granted the franchise whose obligations were set aside by such order, is not a "community * * * interested in the controversy or question before the Interstate Commerce Commission".

B.

HAD THE COMMISSION JURISDICTION TO MAKE THE ORDER COMPLAINED OF?

It is certain that, under the original Act of February 4th, 1887, 24 Stat. L. 379, the Interstate Commerce Commission had no jurisdiction to make the order complained of. *Omaha & Council Bluffs St. Ry. Co., et al., v. Interstate Commerce Commission, et al.*, 230 U. S. 324. It does not possess such jurisdiction now, unless that jurisdiction has been expressly conferred by the later amendatory provisions.

Our contentions are:

I. That the Commission does not have such jurisdiction, unless the purpose to confer it is manifestly evident in some valid Federal Statute;

II. That the purpose to grant to the Interstate Commerce Commission the power to regulate the fares of electric street railways, of the character of said appellant, is not only not *clearly manifest* in the context of the Commerce Act, and the various acts amendatory thereto, but is *manifestly negatived* by the express provisions of the Act;

III. That, were the jurisdiction given, nevertheless, the order in question goes beyond the limitations

upon the powers of such Commission, as such limitations are defined in the "Wisconsin Rate Case".

I.

PURPOSE TO CONFER JURISDICTION NOT MANIFEST.

In determining this question, it is to be remembered that the rule of construction, applicable to acts of Congress encroaching upon the power of a state to regulate and control the transportation of passengers and property within a state, is one of strict construction and will not include intrastate traffic, unless such intent is plainly expressed. In *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 510, Mr. Justice Van Devanter, speaking for the court, says:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

We do not contend that, in a proper case, where the Interstate Commerce Commission *has jurisdiction over the subject matter*, it may not make a valid order relative to *intrastate* rates, wherever such regulation of intrastate rates is *merely incidental* to the regulation of *interstate* commerce *and necessary to its efficiency.*

II.

THE JURISDICTION CLAIMED BY THE INTERSTATE COMMERCE COMMISSION IS NOT CONFERRED BY ANY FEDERAL STATUTE

1. Nowhere, either in the Interstate Commerce Act, as amended in 1910, or in the Transportation Act of 1920, is any reference made to street railways, urban or interurban, aside from the excepting-provisos of the acts.

These exceptions may be summarized as follows:

(*a*) The Transportation Act of 1920, section 402, paragraph 22 (Ch. 91, 41 Stat. L. 478) provides that the Act shall not extend to the construction or abandonment of spur, industrial, etc., tracks located wholly within the state "or of street, suburban, or interurban electric railways, which are not operated *as a part or parts of a general steam railroad system of transportation.*"

Although this Court had held in *U. S. et al., v. R. R. Co. et al.,* 226 U. S. 14, that the original Act did not apply in such case, nevertheless, Congress, out of an abundance of caution, and because of the fact that the Interstate Commerce Commission, despite this decision and that in *Omaha & Council Bluffs St. Ry. Co., et al., v. Interstate Commerce Commission, supra,* continued to exercise jurisdiction over street railways, made this exclusion of jurisdiction a matter of statutory enactment.

(*b*) Section 439 of the same Act (Ch. 91, 41 Stat. L. 494), which added to the Interstate Commerce Act

new section 20a, in defining the term "carrier" as used in section 20 of the Act, reads:

> "As used in this section, the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is *not operated as a part of a general steam railroad system of transportation*) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act." (Italics ours.)

(*c*) In section 300, title 3, of the Transportation Act—creating the Labor Board to deal with disputes between carriers and their employees—it is provided, among other things:

> "When used in this title—1. The term "carrier" includes * * any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban or suburban electric railway not operating as a *part of a general steam railroad system of transportation.*" (Italics ours.)

(d) Paragraph 3, of section 15 of the Act, provides for the establishment of through routes, joint classifications and joint rates, etc., between carriers, subject to the operation of the Act. It provides, among other things:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the *general* business of transporting freight in addition to their passenger and express business, and railroads of a different character;" (Italics ours.)

(*e*) New section 15a of the Commerce Act, as amended by section 422, (Ch. 91, 41 Stat. L. 488)

from which, if at all, jurisdiction to make the order in question can be claimed to be derived, reads in part as follows:

> "When used in this section * * * the term "carrier" means a carrier by railroad * * * subject to this act, excluding, * * * (b) street or suburban electric railways unless operated as a *part of a general steam railroad system* of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or *engaged* in *the general transportation* of freight." (Italics ours.)

(*f*) Section 204, of the Transportation Act, (41 Stat. L. 460), relating to reimbursement of deficits during Federal control, in part, is as follows:

> "When used in this section—The term "carrier" * * * does not include any street or interurban electric railway which has as its *principal source* of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both." (Italics ours.)

(*g*) Section 209 of that Act (41 Stat. L. 464), relating to guaranty to carriers after termination of Federal control, reads, in part, as follows:

> "When used in this section—The term "carrier" * * * does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its *principal source* of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both." (Italics ours.)

In view of these provisions, does a street railway,

of the character in question, come within the purview of the Interstate Commerce Act, as amended by the Transportation Act of 1920?

Ordinarily, the term "railroad" does not include a street railway. In *Omaha & C. B. St. R. Co., et al., v. Inters. Com. Com.*, 230 U. S. 324, 335, this Court quotes with approval the language of the Court of Appeals of Kentucky:

> "A street railroad, in a technical and popular sense is as different from an ordinary railroad as a street is from a road."
>
> *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. 175.

On the other hand, where the context of the statute and the purpose intended to be accomplished by the Act require it, the term "railroad" is often held to embrace a street railway. The meaning of the term must always be determined by construing the statute as a whole.

In *Omaha & C. B. St. R. Co., v. Inters. Com. Com., supra,* (bot. p. 335, 336), this Court says:

> "But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "railroad" will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute."

It is for this reason that we have quoted so voluminously from the statutes in question.

Section 15a makes its first appearance, as section 422, in the Transportation Act of 1920. Paragraph 4,

of present section 13, of the Commerce Act, was amended into its present form as Section 416 of the Transportation Act, (41 Stat. L. 488).

Mr. Chief Justice Taft, in delivering the opinion of the Court in the Wisconsin Rate Case, points out at length the primary reasons animating the passage of the Transportation Act. None of these apply to the embodiment within the purview of that Act of a street railway of the character in question. So that, as far as the *purpose* of the Transportation Act is concerned, there is no reason to suppose that there was any intention to include, within its purview, electric street railways generally. When we look to the *language* of the excepting provisos, above quoted, this conclusion is still more apparent.

If, as suggested in the Wisconsin Rate Case, paragraph 4 of section 13, and section 15a should be construed together as defining the power of the Commission over intrastate rates, we must conclude that such power can be only exercised in any event, as to the rates of an electric street railway, where:

(*a*) Such railway is "operated as a part of a general steam railroad system of transpor"; or

(*b*) Is *engaged* in the *general* transportation of freight.

2. Assuredly, the Pennsylvania-Ohio Power & Light Company is not operated as a part of a general steam railroad system of transportation.

The only steam railroad with which it has any switch connections is the New York Central. One of these, as we have shown above, is a private switch, and

the other, a railroad siding. There is no traffic arrangement between the two companies, nor is there any division of freight rates. On the other hand, demurrage is charged upon cars delivered by the New York Central to such street railway as soon as the cars are delivered to the latter's line. Thus, the railroad treats the railway as the agent of the consignee for purposes of delivery.

3. Nor, as we view it, is such street railway *engaged* in the *general* transportation of freight. It is true that the record shows that, in two years, it received 922 cars of freight from the New York Central Railroad —an average of about 9 cars a week. Tri-weekly, a through car, for the transportation of freight and express packages, is operated from Sharon, Pennsylvania, to New Castle, Pennsylvania. It originates no freight, however, for delivery to the New York Central, nor does it originate any of the freight or express carried by this tri-weekly service. Such service begins and ends over lines other than that of the Pennsylvania-Ohio Power & Light Company. Its line only furnishes a connecting link between the lines of the other two companies.

The revenues, received from freight and express service combined, amount to but seven per cent. of the total revenues of the Company. No schedule of freight tariffs is filed with the Interstate Commerce Commission, as would be required were the Company *engaged* in the *general* transportation of freight.

The Company charges whatever it sees fit—in short, what the traffic will bear. If the boot were on the other foot, and if shippers were endeavoring to com-

pel the Company to accept freight, it unquestionably would be before the Commission loudly protesting that it was not a "carrier, subject to the provisions of the Act"; that it had no facilities for handling freight; that it only possessed three old and light-weight freight cars; that its road-bed was not fitted to carry heavy freight over it; and that, for it to undertake to handle freight, would be to the detriment of the primary purpose for which it was organized, and for which it received its various franchises; namely, as a carrier of passengers for hire. All of which contentions, would be well founded, as shown by the record in this case.

How, under such conditions, can it be successfully contended that such street railway is engaged in the *general* transportation of freight? It is true, that it is engaged in the *transportation* of freight, but is it engaged in the *general* transportation of freight?

It is an old and familiar rule of construction, laid down in scores of cases, that:

> "That construction of a statute is to be favored, and must be adopted if reasonably possible, which will give meaning to every word, clause, and sentence of the statute and operation and effect to every part and provision of it." *Black on Interp. of Laws*, 2 Ed. 322, and cases cited.
>
> *U. S. v. Daniels*, 279 Fed. 844, (2 Ct.);
> *Dwight & Lloyd Sintering Co. v. American Ore Reclamation Co.*, 263 Fed. 315 (2 Ct.); Certiorari denied, *American Ore, etc. Co. v. D. & L. S. Co.*, 252 U. S. 582.

In *U. S. v. Ninety-Nine Diamonds,* 139 Fed. 961 (8 Ct.), the first paragraph of the syllabus is as follows:

> "All the words of the statute should have effect. The intention of the enacting body is not expressed by a part, but by all of the statute; and as the purpose of construction is to ascertain that intention, 'all the words of a law must have effect rather than that part should perish by construction.' "

If Congress had intended that, wherever a street railway carried freight, it should be subject to the provisions of the Acts in question, it surely would have said so. When it enacted that such street railways only, as are engaged in the *general* transportation of freight, shall be subject to the Act, it surely used the word *"general"* advisedly.

A street railway that is engaged in such a limited transportation of freight as the one in question, that initiates not a pound of freight, that receives and carries only such as it desires, and charges for such carriage only such rates as it sees fit to charge, can surely not be said to be engaged in such *general* transportation.

4. A consideration of sections 204 and 209, *supra,* of the Transportation Act, (the former section, relating to the reimbursement of deficits during Federal control, and the latter, to guaranty to carriers after termination of Federal control) would lead to the conclusion that no street or interurban electric railway is engaged in the general transportation of freight, where its *principal* source of revenue is from passenger traf-

fic, and the sale of power, heat and light. Each of these sections provides that the term "carrier" shall not include a street or interurban electric railway, not under Federal control at the time Federal control terminated, "which has, as its *principal* source of operating revenue, urban, suburban, or interurban passenger traffic or sale of power, heat, or light, or both".

5. Counsel for appellants urge that, while the Pennsylvania-Ohio Power & Light Company may not have been engaged in the general transportation of freight, yet the Commission found that it was, and, therefore, its finding is binding upon this Court. To this, we reply, that this question is jurisdictional, and we do not believe that, even were the facts in dispute, the finding of the Commission, upon a jurisdictional question, would be conclusive upon this Court.

However, the facts are not in dispute, but appear in the report of the Commission itself. Its legal conclusion that the facts stated establish that the Pennsylvania-Ohio Power & Light Company is engaged in the general transportation of freight, is supported by no substantial evidence; and, therefore, if we are correct in our above contentions, the Commission was wholly without jurisdiction to enter the order complained of.

III.

THE ORDER IS OTHERWISE VOID

Even if the street railway is a "carrier", subject to the provisions of the Act, the order in question violates the specific proviso of the Commerce Act, that the

Commission is not to regulate traffic wholly within the state.

In the *Wisconsin Rate Case,* 257 U. S. 563, it is held that, despite the proviso of the Commerce Act that the Commission is not to regulate traffic wholly within the state an order by the Commission raising the intrastate rates to a level of the interstate structure, which order is *merely incidental* to the regulation of interstate commerce, and *necessary to its efficiency,* does not violate the proviso referred to.

The apparent extent of the limitation upon the power of the Commission is to be found in the opinion of the Court (bot. p. 590, 591):

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to *substantial* disparity which operates as a *real discrimination against* and *obstruction to,* interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

In the instant case, in contravention of its solemn contract obligations, the Pennsylvania-Ohio Power & Light Company raised its rates from Hubbard to Sharon. No part of its line was without the State of

Ohio, and only for a distance of one mile does it operate beyond the State limits, over the track of another company.

It makes such violation a ground for its petition, to the Interstate Commerce Commission, to order it to commit another.

As we have shown above, the State authorities, "exercising their appropriate discretion to deal with intrastate rates", refused to permit the street railway to enjoy the privileges of its franchise without complying with its obligations.

The Interstate Commerce Commission, however, under the guise of regulating interstate commerce, grants the prayer of the street railway to "order" it to again violate its contract.

If the existing condition presents a "real discrimination against and obstruction to" interstate commerce, and if the regulation of the *intrastate* rate through the Village of Hubbard and the City of Youngstown, and over the public highways of Trumbull and Mahoning Counties, Ohio, is "merely incidental" to the *interstate* traffic over a mile of another company's railroad, then, indeed, the tail wags the dog.

In *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 541, 547, the rule is laid down that the orders of the Commission are not final if, in the language of the Court:

> "The authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule

that the substance, and not the shadow, determines the validity of the exercise of the power."

We respectfully submit that the claimed grievances against interstate commerce, arising out of the carrying out by the Pennsylvania-Ohio Power & Light Company of the burdens imposed by its franchise, at the same time that it accepts its benefits, are more than shadowy. They are "made of such stuff as dreams are and as baseless as the fantastic fabric of a vision."

IN CONCLUSION

We respectfully refer the Court to the decision of the Court below, reported in 278 Fed. 754, where the reasons for that Court's decision are more ably set forth than we are able to put them.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NO. [redacted]26 OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE CITY OF WELLSVILLE, OHIO.

BRIEF FOR THE CITY OF WELLSVILLE, OHIO.

Appeal From the District Court of the United States for the Northern District of Ohio.

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THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE CITY OF WELLSVILLE, OHIO.

Appeal From the District Court of the United States for the Northern District of Ohio.

Statement.

This cause was appealed from the final order of the District Court which permanently annulled and enjoined the order of the Interstate Commerce Commission, Ohio and Pennsylvania Rates, Fares and Charges, 64 I. C. C., 517 (tr. 15). The order was originally made by the Commission on behalf of the Steubenville, East Liverpool and Beaver Valley Traction Company (Tr. 7). The order is (Tr. 15).

This order in effect directed an increase of fares, the Commission claiming the rates then in force conflicted with Interstate fares.

The lower Court found that the traction company is not an interurban electric railway operating as a part of a general steam system of railway transportation, nor is it engaged in the general transportation of freight in addition to its passenger service, and held the Commerce Commission was without jurisdiction to hear and determine the controversy.

The City desires to cite the case as reported, *The City of Wellsville vs. The United States,* 278 Fed. Rep., 769; and *Village of Hubbard vs. United States,* 278 Fed. Rep., 754, (Tr. 33).

This traction company by its predecessors first obtained a franchise from the City of Wellsville and from the City of East Liverpool, Ohio, for local street car service between the two cities, in 1891, and this grant has been renewed from time to time and still has about eight years to run.

In 1907 the franchise was again renewed for 25 years, and at this time the line was double tracked and it connected with another line running down the Ohio Valley to Steubenville, Ohio, also up the Valley to Beaver, Pennsylvania.

In the year 1916 the defendant traction company by merger or lease or purchase acquired street car lines, enabling it to run cars over the tracks under its control into Pennsylvania, West Virginia from Ohio.

The local ordinances provided for a five cent fare and the order of the commission greatly increased this fare. Record, page 10.

The company has no connection with any Steam line and the statement in brief for the United States is in error when it states at page four that the Traction Company connects with the Pittsburgh and Lake Erie Railroad as it merely runs to a place near to the Railway depot in Beaver and passengers who so desire may walk to the depot of the Steam Railway.

The Traction Company has no connection with any Steam line for carrying freight and handles but one freight car so called on a part of its lines each day from Steubenville to Midland, and a through freight car runs once a week from Steubenville to Beaver.

It handles no baggage. Record, page 8.

The freight business is so small a part of the earnings that the Commission in its report ignores the amount received from this source.

The lower Court found in 278 Fed., 769, *Wellsville vs. United States et al.,* that the amount of freight earnings are so small that they were not reported separately but included under gross earnings.

If any question is raised as to a direct connection with any Steam Railroad the City of Wellsville requests that it be allowed a diminution of the record of evidence taken by Interstate Commerce Commission on this question, as there is no direct physical contact by

this Traction Company with any Railroad and no cars of freight or passengers are switched from one concern to the tracks of the other, and they do not exchange passengers with any Steam Railroad, except as they run near to the depots of Steam Carriers or past the same and passengers alight from the traction cars and go to the Railway from the Railway to the Street cars. It is of course possible and no doubt true that these carriers do arrange schedules making it easy for passengers to do this.

The order of the Commission in this case was made by a divided vote of four to five.

The City does not desire to burden the record by a further physical description of this Traction Company line as it appears to be fairly described in the briefs filed and in reported cases of the same cited above.

Argument.

The City of Wellsville asserts that this case should be dismissed for the reason the same has been ended and there now exists only a moot question to decide.

On January 10, 1923, by Ordinance No. 984, passed by Council of the City of Wellsville, Ohio, and approved by the Mayor, and accepted by the Traction Company defendant herein, and by Ordinance No. 1877 duly passed by the Council of the City of East Liverpool, Ohio, April 16, 1923, and approved by the Mayor and accepted by the Traction Company, all questions of fare were duly adjusted by the parties and the Traction Company is now and has ever since the adoption of said ordinances, been operating its cars under the same.

As the only object in this case was to secure higher rate of fare and this has been since the decision in the lower Court adjusted, the City feels this cause ought to be dismissed.

It is contended that the City of Wellsville has no such interest in this controversy that it is entitled to be heard and that it cannot maintain this action.

The general rule is that an interested party may maintain a suit to secure any right properly coming to it of which a court would have jurisdiction.

In Ohio the Cities are given the right to make franchise ordinances, such as in this action give the traction company a right to operate on the streets, it

has been repeatedly held by the Supreme Court of Ohio, that cities have such rights and that such a contract is one that the Courts will enforce. In an unreported case the Supreme Court of Ohio held that the City of Wellsville could enforce the contract in controversy in this matter, and that it had the right to compel the traction company to maintain reasonable service, when the company refused to operate its line.

The rate of fare is a question vitally affecting a city, and when the Inter State Commerce Commission undertook to take jurisdiction in this case, before any order was made, the City of Wellsville was served with notice to be present and was present and filed a brief.

When the order raising the rate of fare was made by the Commission the City was notified.

Under Section 968 United States Statutes, as printed in Barnes Code at page 236, a provision is made allowing a suit to be begun to annul and enjoin the order of the Commerce Commission, and this is the Statute the City invoked to begin this action.

The next Section 969 provides who shall hear the case.

We submit that this Statute gives the City a right to maintain this suit.

Section 7922, Barnes Code, page 1898, further provides that it shall be lawful to include as parties, in addition to any carrier, all persons interested in or affected by any such order, made by the Commission.

We insist that if a franchise contract is involved as in this case, when the contract was made between the City and a carrier, the municipality ought to be made a party, and be heard, the same as any other party, in interest to seek redress for any property right it has involved, as against an erroneous order of the Inter State Commerce Commission.

It has even been the practice to permit representative association and exchanges to institute and maintain proceedings before the Commission and to be heard in Court against its orders.

City of New York vs. United States et al., 272 Fed., 768.

In this case the City of New York was a party plaintiff and was heard by express order of the Court.

Also 257 U. S., 591, *State of New York vs. U. S.*

Ohio Cities, may be parties to actions to enjoin violation or to enforce the terms of a franchise.

Ohio General Code, 4311 and 4312.

Springfield vs. Springfield Gas Co., 12 C. C. R. (N. S.), 392, affirmed no report, 81 O. S., 537, 91 N. E., 1139.

In the *Wisconsin Rate Case*, 42 Supreme Court, 232, and in all the other reported cases the States are allowed to begin the same kind of case as is involved in this one by the City as plaintiff. The City gives the

franchise grant by authority given it by the State or not reserved by the State.

Interurban and Terminal Ry. vs. City of Cincinnati, 93 O. S., 108;

Interurban Railway and Terminal Co. vs. Public Utilities Commission of Ohio, 98 O. S., 287;

The Columbus Railways and Power Co. vs. Columbus, Ohio, 249 U. S., 399.

POSITION OF THE CITY OF WELLSVILLE.

The position of the City of Wellsville in this proceeding is as follows:

1. The Commission had no jurisdiction to enter any order changing the rates, fares, and charges fixed by ordinance for intra state hauls or journeys.

2. That the transportation act of 1920, does not give jurisdiction to the I. C. C. over street, suburban, or interurban railway, rates, fares, and charges of a company of the character such as the one involved in this proceeding.

3. Assuming jurisdiction, discrimination has not been proven or shown or found.

PART I.

Law.

"A"

Decisions of the Supreme Court of the United States and of the State of Ohio, showing that a franchise ordinance, passed by a municipality and accepted by a street car company constitutes a binding contract, and, that the street car company operating under it is bound by its terms.

ALSO SECTIONS OF GENERAL CODE OF OHIO AND CONSTITUTION.

Also, that the terms cannot be abrogated under the police powers of a municipality or a state. Showing, further, that a company which takes over another company, to which a franchise ordinance had previously been given is bound by the terms and conditions imposed upon the original company. And, showing further, that the mere fact that a franchise contract turns out to be an unprofitable venture is not sufficient reason for a Court to interfere with its terms.

Interurban Railway & Terminal Company et al. vs. The City of Cincinnati, 93 O. S., page 108, the syllabus reads as follows:

An ordinance passed by a village council, granting a franchise to an interurban railway company to construct its line through the village, contained the following provision: "Should the village of Pleasant Ridge be annexed to the City of Cincinnati, the rate

of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents." The company thereafter duly accepted the franchise and constructed, maintained and operated its line thereunder. Subsequently the village was annexed to the city. Held: the acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its road thereunder its terms must control.

It appears in this case on page 110 that the Interurban Railway & Terminal Company is a consolidation of other companies among which was the Rapid Railway Company to which the original franchise was given, and that the present company is operating under and by virtue of the franchise ordinance originally given to the Rapid Railway Company. And, as above indicated, the Court held that the consolidation company was bound by the terms and conditions imposed upon the original company.

The franchise ordinance originally given in this case was in 1901, at which time the laws pertaining to the rights of municipalities to give franchises to street car companies was the same as in 1906, when the City of Wellsville gave the franchise to the traction company in the case at bar.

On page 123, the Court, towards the conclusion of the opinion rendered in this case uses the following language:

"It is insisted that the enforcement of the terms

of the franchise under inquiry here will work hardship and irreparable injury to the company; and cases are cited in support of the accepted proposition that neither the state nor any of its agencies can, by regulation or legislation, withhold from the owners of the railroad just compensation for its services. But in this case we are dealing with the subject of contract. It implies a meeting of minds. It is much to be regretted if the amount which the interurban company is required to pay to the Cincinnati Company for the use of its tracks is too large a proportion of the fares received, and it is equally to be regretted if the fare provided by the contract itself does not furnish a compensatory return to the company. The presumption is that it was to the interest of the village and to every municipality to provide such a compensation for the services to be rendered by the public utility as will induce the investment of the capital necessary to the furnishing of the service. In fact, it may be said that it is the duty of the municipal and other authorities to provide sufficient compensation. It is equally the duty of the company not to contract to perform a service for less compensation than is proper.

But we are not able to see how the Court can alter the terms of the contract in this case as the parties made it. The only thing the court can do is to enforce the contract as it finds it, and to hold that as long as the company continues to operate under the franchise it must submit to the terms thereof."

The Interurban Railway & Terminal Company vs. The Public Utilities Commission of Ohio, 98 O. S., 287. Decided June 21st, 1918.

In this case the Supreme Court approved and follows the principle set forth in 93 O. S., 108. And in proposition one of the syllabus gives the following language:

> "1. When the terms of a valid ordinance granting a franchise to a street or interurban railway company are accepted by the grantee, such action constitutes a contract between the parties. As long as the company retains a franchise and operates its road thereunder its terms must control."

This case further holds that contracts of that kind are protected by the consolidation and that the Public Utilities Commission of Ohio does not possess the right to change the terms of these contracts as designated by the franchise ordinances.

On that proposition, paragraph three and four of the syllabus read as follows:

> "3. A contract concerning proprietary rights, and harmless in itself, made by a municipality in the exercise of power clearly conferred, is protected by the constitution, and the police power cannot be invoked to abrogate or impair it.
>
> "4. The statutes of Ohio which create the Public Utilities Commission and define its powers do not confer authority on the commission to change rates fixed by the terms of valid contracts made by

a public utility with a municipality in the exercise of powers clearly conferred upon it."

It may be that the franchises which were granted to The Steubenville, East Liverpool and Beaver Valley Traction Company's predecessors and to which that company succeeded are not at the present time so attractive as they were at the time they were granted, but this does not bring to an end the obligations of the valid contracts entered into with the municipalities. As stated by the Supreme Court in the case of *Columbus Railway and Power Company vs. Columbus,* 249 U. S., 399, 414 (April 14, 1919):

> "It may be, and taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the Company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly constituted authorities having the control of the subject-matter."

The statutes in existence in Ohio, with reference to the right of cities to give street railroad, suburban and interurban franchises have been fully set forth in Exhibit "D" filed in behalf of the cities. And, they show that the cities have power and authority to enter into such contracts. The Sections of the Statutes so filed

are found in the General Code of Ohio, and are as follows:

3768, 3777, 3778, 9100, 9101, 9113, 9131, 9132 and 9133.

Also refer to Sections 4 and 5 of Article 18 of the Constitution of the State of Ohio, which also gives the right to cities to enter into such franchises.

"B"

The parts of the "ACT TO REGULATE COMMERCE AS AMENDED BY THE TRANSPORTATION ACT OF 1920," which shows that there is no jurisdiction of the Commission in cases such as are involved in this proceeding.

SECTION 15—Paragraph 3.
SECTION 15—A Sub-division "B" and "C."
SECTION 20—A—(1).

"C"

Giving excerpts of decisions rendered by the Commission itself, prior to the passage of the Transportation Act of 1920, in which the Commission sets forth the limits of its powers under Section 3 of the Commerce Act, where it was called upon to remove discriminations.

"We have held that discriminations under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored." *Board of Trade of Chicago vs. A., T. & S. F. Ry.*, 29 I. C. C., 438, 443.

"Where the allowances prescribed by law for

local shipments are paid, lower charges result on local than on export shipments, but MERE DIFFERENCES IN CHARGES DO NOT ESTABLISH UNJUST DISCRIMINATION." *Shands vs. S. A. L. Ry. Co.,* 34 I. C. C., 214, 215.

"Not all discriminations are unlawful, but only those that are unjust." *American Coal & Coke Co.,* 36 I. C. C., 195, 197.

"The testimony as to the alleged unjust discrimination in grain rates was exceedingly meager and unsatisfactory, CONSISTING CHIEFLY IN A SHOWING OF THE PRESENT RELATION OF THE RATES THEMSELVES. IT AFFORDS NO ADEQUATE BASIS FOR A FINDING THAT UNJUST DISCRIMINATION EXISTS." *Holmes & Hollowell Co. vs. Great Northern Ry.,* 37 I. C. C., 627.

"The provisions of the act against unjust discrimination speak to the carriers of the country individually and with respect to those things for which they are individually responsible, and not to the carriers as parts of a single great system." *Galloway Coal Company et al.,* 40 I. C. C., 311, 315.

"Shippers at Nashville compete with shippers at Chattanooga, Tenn., and similar points. The switching charges maintained at these points are not based on cost, but there is no evidence that Nashville shippers would be handicapped by the charges proposed at Nashville in meeting such competition. Respondents challenged protestants to show in what way and to what extent shippers at Nashville would be injured but without eliciting any convincing replies. Not every difference in

rates to competing points from common points of origin constitutes unjust discrimination—*City of Astoria vs. S. P. & Ry. Co.,* 38 I. C. C., 16—and different switching charges at competing points may also be entirely equitable." *I. & S. Docket No. 758. Nashville Switch Case,* 40 I. C. C., 483, 496.

"The mere maintenance of a rate for movement of traffic wholly within a state lower than a rate found reasonable by this Commission for the local state portion of a through interstate movement does not of itself constitute undue discrimination within the meaning of the Act. The State Public Utilities Commission of Illinois, acting within the scope of its authority, has the undoubted right to prescribe rates of freight applicable to movements of traffic by railroad wholly within the State of Illinois. In a case which merely calls to our attention the fact that a state rate is lower than an interstate rate on the same traffic from and to the same points, we have no authority or power to condemn the state rate and take action which would be warrant to carriers to increase it to the level of the applicable interstate rate. It is only in cases where the rates prescribed by the state authorities necessarily operate to unduly prefer a state over an interstate shipper, or to otherwise interfere with the proper application of rates prescribed by this Commission, that the authority of the federal law is properly to be exercised." *Memphis Merchants Exchange, et al., vs. Illinois Central Railroad Company, et al.,* 43 I. C. C., 378.

"We must, to make a finding of discrimination, be shown the fact of discrimination, not merely the

difference in ratings without the cause and reason for the difference. Uniformity is desirable and in some instances it is necessarily required; but its absence does not *prima facie* connote illegality, as differences in transportation conditions may, and frequently do, require a deviation from uniformity in particular instances to accomplish the legality and reasonableness of rates which the law exacts." *National Confectioner's Association, et al., vs. Aberdeen & Rockfish Railroad Company, et al.*, 49 I. C. C., 566, 576.

"It is well settled that discriminations under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored, and that generally a competitive relation between the commodities must appear." *Board of Trade of Chicago vs. A., T. & S. F. Ry. Co.*, 29 I. C. C., 438, 443. *California Walnut Growers' Association, et al., vs. Aberdeen & Rockfish Railroad Company, et al.*, 50 I. C. C., 558, 568.

In *City of Astoria vs. S. P. & S. Railway Company*, 38 I. C. C., 10, January 22, 1916:

The Commission emphasized the point that in order to constitute unjust discrimination within the meaning of the act, the rates complained of must adversely affect the commerce of one point and thereby materially benefit the commerce of another. In discussing the issues, the Commission stated as follows (at page 24):

"It has long been a settled doctrine in this Commission that the mere maintenance of higher rates to one point than to another is not an unjust

discrimination within the meaning of the act; it is only when the general conditions of transportation and the general circumstances surrounding the traffic are substantially similar and such a rate, relationship adversely affects the commerce of one point and thereby materially benefits the commerce of the other point, that it may be said to involve the preferences and discriminations prohibited by law, as between different communities served by the same carriers."

The case of *Huston & Texas Railway Company vs. U. S.*, 234 U. S., page 342:

This case is commonly known as the "SHREVEPORT" case and is frequently cited by the carriers to show that the Interstate Commerce Commission has a right to remove a discrimination against interstate commerce by ordering that the intrastate rates be raised to the level of interstate rates.

The Court, on page 356, says:

"It is apparent from the legislative history of the act, that the evil of discrimination was the principle thing aimed at."

"D"

Cases in which street railways have been defined and differentiated so far as the Interstate Commerce Act is concerned. Also showing right of street car companies to carry freight in the State of Ohio, etc.

Omaha and Council Bluffs Street Railway Com

pany vs. Interstate Commerce Commission, 230 U. S., page 324. On page 336 of this case the Court said:

> "Street railroads are local, are laid in streets as aids to street traffic, and for the use of a single community even though the community be divided by state lines or under different municipal control. Street railroads transport passengers from street to street, from ward to ward, from city to suburb."

And again (page 338):

> "The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs."

The court pointed out the characteristics of ordinary railroads as distinguished from street railroads as follows (at page 336):

> "* * * Ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. * * * The commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between States,' 'between States and Territories,' 'between

the United States and foreign countries.' * * * The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in 'every depot, station or office where passengers or freight are received for transportation.' The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

On page 337, the Court uses the following language in its opinion:

"A new type of interurban railway has been developed which, with electricity, as a motive power, uses larger cars and runs thru the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed."

We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight.

In the case of *In re Avon Beach & Southern Ry.*, 16 O. D. (N. P.) 87, Judge Washburn stated as follows (at page 94):

"* * * The legislature has been careful to keep the laws in reference to each (street railroads and steam railroads) separate and distinct; and

has enacted, that whatever their charters are, they shall be judged as to which they really are, for purposes of taxation, by the manner of their construction and operation, and the character of the business they engage in.

"Plaintiff (street railroad) will not claim that it should be taxed as a steam railroad, nor that the fellow servant statute, applicable to steam railroads, is applicable to it. *It hardly seems proper to permit a company to do one thing under the guise of doing something else, and to claim the rights and benefits of one class of railroads, and escape the disadvantages and liabilities of that class.*" (Italics ours.)

IN REGARD TO CARRYING FREIGHT.

In Ohio the courts have held that this cannot be the test, in fact, that municipalities may not even deny the right to a street railway of carrying freight. This fact is squarely stated in the case of *Ohio vs. Dayton Traction Company*, 18 O. C. C., 490, 496. The second proposition of the syllabus in that case is as follows:

"The Council of a city may refuse permission to a street railway company to construct its road in its streets, but if it grants permission, it may not do so upon the condition that the company does not exercise one of its corporate powers, and therefore a condition or regulation that the Company shall not carry freight is void."

The judgment of the lower court in the above case was affirmed by the Supreme Court of Ohio on appeal in *Ohio vs. Traction Company*, 64 O. S., 272.

"E"

Authorities and decisions supporting the propriety of reference to Legislative proceedings, and showing that the words "undue burden" were stricken out by the conference committee and in their place written in, "UNDUE, UNREASONABLE OR UNJUST DISCRIMINATION."

It appears to be well settled that when an act to be construed is capable of various interpretations, reference may be had to representations made to Congress, and to testimony before committees, to committee reports, and to statements made concerning the purpose and meaning of the bill while under consideration in either house by the committee member having the bill in charge.

Holy Trinity Church vs. United States, 143 U. S., 457, 464; *Johnson vs. Southern Pacific*, 196 U. S., 1, 19; *Houston & Texas Railway vs. United States*, 234 U. S., 342; *Caminetti vs. United States*, 242 U. S., 470, 490; *Corona Coal Company vs. Southern Railway*, 266 Fed., 726, 732; *Duplex Printing Company vs. Deering*, U. S. Supreme Court, unreported.

In the case last cited, this court laid down the rule concerning statements in debate and cited authorities as follows:

> "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the mean-

ing and purpose of the law-making body. *Aldridge vs. Williams*, 3 How., 9, 24; *United States vs. Union Pacific R. R. Co.*, 91 U. S., 72, 79; *United States vs. Freight Association*, 166 U. S., 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns vs. United States*, 194 U. S., 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. *Binns vs. United States, supra.; Penna. R. R. Co. vs. International Coal Company*, 230 U. S., 184, 198-199; *United States vs. Coca Cola Co.*, 241 U. S., 265, 281; *United States vs. St. Paul, M. & M. Ry. Co.*, 247 U. S., 310, 318."

Courts have often held that in construing statutes consideration should be given to their legislative history.

In the case of *Connole vs. Norfolk & Western Ry. Co.*, 216 Fed. Rep., 823 (September 2, 1914), District Judge Sater stated as follows (at page 825):

"If the refusal of a legislative body to narrow comprehensive language shows an intention to enact a comprehensive statute, then the converse of that proposition is also true, and if it appears that by amendment words of enlargement are stricken out and words of limitation inserted in

their stead, the court shall hold that the legislative intent was to restrict."

In the case of *In re Valhoff*, 238 Fed. Rep., 405 (November 23, 1916), the District Court of the United States for the Southern District of California stated as follows (at pages 407, 408):

> "The history of a statute, from the time it was introduced until it was finally passed, may afford some aid to its construction. The reports of committees, the introduction of amendments, and the opposition made to the passage of a statute in its various forms, are legitimate aids to its construction."

Many other decisions of the Federal Courts and of the Supreme Court of the United States might be cited to show that consideration should be given to legislative history in interpreting and construing statutes.

The situation in the present case is a striking demonstration of the fact that the persons who appeared before the Interstate Commerce Committee of the House of Representatives and urged the elimination of the "undue burden" clause had a true conception of the use to which the railroads might seek to put this clause were it enacted into law.

"UNDUE BURDEN" PROVISION STRUCK OUT BY CONFERENCE COMMITTEE.

The Conference Committee struck out from paragraph (4) the words "undue burden" and wrote in their

place "undue, unreasonable or unjust discrimination," thereby making clear an intent to confine the operation of the law to what Judge Thom called "the discriminatory character of the rates," and not to extend it to what he called "undue inequality of rates." In such form the paragraph became, so far as its effect upon State power of rate regulation was concerned, a mere restatement of the effect of Section 3 of the Act, and left untouched the reserved power of the States over rates on traffic within their own borders, other than as such power was before limited by Section 3 of the Commerce Act.

ORIGIN OF WORDS "UNDUE, UNREASONABLE OR UNJUST DISCRIMINATION."

These words, "undue, unreasonable or unjust discrimination" were taken from Section 43 of a bill which had been introduced by Senator Cummins, known as the Cummins Bill, being S. 2906. This bill had passed the Senate as an amendment to H. R. 10453, and was under consideration by the Conference Committee. Section 43 proposed to amend Section 13 of the Commerce Act substantially as did Section 415 of H. R. 10453, except that the quoted words stood in the place of the words "undue burden."

S. 2906 was introduced on or about August 25, 1919, and various portions of H. R. 4378 were incorporated in it, with or without changes.

An effort has been made in this Brief, as much as reasonably possible, to cite at least one case to substantiate every material point which the Municipalities are basing their contentions upon. Perhaps the first two points thus raised by the Municipality can be treated together in this argument.

FIRST. This Commission was without jurisdiction to enter an order so far as the rates, fares and charges are fixed by franchise ordinances for intrastate hauls or journeys.

SECOND. That the "Transportation Act of 1920" does not give jurisdiction to the Commission over street, suburban or interurban railway fares, rates and charges, such as are involved in this proceeding.

The Supreme Court of the United States as well as the Supreme Court of Ohio has laid down the rule that where a franchise ordinance has been enacted by a Municipality and accepted by a traction company or similar utility that the franchise constitutes a binding contract. That such contract can only be changed by mutual consent of both of the parties to the same. That even the Public Utilities Commission of Ohio does not have a right to interfere where the rates or other terms have been so fixed by franchise. Where two or more companies have been consolidated into a later one or merged into one, and the merging company continues to operate in the cities under the franchise given to the first company, that the latter company is obliged to conform to all the terms, rates and regulations of the franchise so given to the original company.

The cases referring to the propositions above set forth are as follows:

Interurban Railway & Terminal Co. vs. The City of Cincinnati, 93 O. S., 108;

Interurban Railway & Terminal Co. vs. Public Utilities Commission of Ohio, 98 O. S., 287;

The Columbus Railway & Power Co. vs. Columbus, Ohio, 249 U. S., 399.

To further support the contention of the Municipality that the Commission is without jurisdiction in the premises attention is called to the following parts of the *"Act to Regulate Commerce, as Amended by the Transportation Act of 1920."*

Section 15—Paragraph 3.

"The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare or charge, between street electric passenger railways not engaged in the general business of transporting freight, in addition to their passenger and express business and railroads of a different character."

Also, in Section 15-A (Added Feb. 28th, 1920, of the Interstate Commerce Commission Act). In the exception set forth in which this Act shall *not* apply, under sub-division "B" the following language appears:

"Street or suburban electric railways, unless operated as a part of a general steam railroad system of transportation."

And under "C" of the same section, the following exceptions appear:

> "Interurban electric railways unless operated as a part of a general steam railroad system or transportation, *or engaged in the general transportation of freight.*"

Section 439. The Interstate Commerce Act is further amended by inserting therein a new section between section 20 and section 21, to be designated section 20a, and to read as follows:

> "Section 20a (1). That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act."

The language of the parts above set forth clearly indicate to what extent the Interstate Commerce Commission has jurisdiction over street railways so far as the cities of Steubenville, East Liverpool and Wellsville are concerned.

SHOWING EVEN TRANSPORTATION OF FREIGHT DOES NOT GIVE JURISDICTION OVER THE COMPANY.

At this point it is desired to call attention of this Court to the particular points involved in this Argument. It develops the fact that the S. E. L. & B. V. T. Co. is a merger of a number of local street railways companies. For instance in the cities of East Liverpool, Steubenville and Wellsville, franchises were originally given by the respective cities to street car companies to do a street car business. In most instances the street car company travels exclusively within the respective cities and in all cases they are purely *intrastate*. The record shows that both in East Liverpool in the Steubenville, there are what is termed "city lines and interurban lines." Even I. C. C. No. 8, filed by this S. E. L. & B. V. T. Co., shows what is termed "THROUGH SERVICE RATES RUNNING FROM STEUBENVILLE, OHIO, TO POINTS IN PENNSYLVANIA AND WEST VIRGINIA," and shows what is termed "LOCAL SERVICE RATES IN STEUBENVILLE, OHIO," and "LOCAL SERVICE RATES FOR EAST LIVERPOOL AND WELLSVILLE, OHIO." The record shows by testimony of the traction company officials that the city and interurban lines are operated as *distinct lines*.

The local cars in practically all instances are smaller cars; the schedule of the local cars being much more frequent than that of the interurban cars; in some instances, particularly in Steubenville, for many squares the local lines run parallel to the interurban

lines and yet different tracks are used almost exclusively in the Cities of Steubenville and East Liverpool for the two different routes. As a matter of fact, according to I. C. C. No. 8, a higher fare is set forth for a ride in the Cities of Steubenville and East Liverpool on the interurban cars than the fare for the same distance and over the same parts of the cities on the local cars. The record further shows that most of the tracks of the local cars in the Municipalities travel on public streets and that no baggage is handled on these cars. There is some evidence showing that an express car occasionally runs over to the tracks of the local lines and that a freight car is run once a day from Steubenville to Beaver, which is the course of the interurban line. The records and Exhibits of the company show that they kept separate accounts of the operating expenses and income and of all other phases of the various lines.

It is submitted to this Court that the merger of this traction company made up of all the local companies was done of their own volition and without consultation or consent of the respective municipalities and that therefore this merger should not be permitted to change the character of the street car companies as they existed at the time that the franchises were given, by the cities. If it were conceded that a merger or consolidation could change the original character of a street car company it is quite obvious that an endless lot of confusion would result and that similar mergers or consolidations could be developed to such an extent that almost all the street railways in this country could be brought within the jurisdiction of the Commission.

It certainly does not seem reasonable that such a situation was ever intended by the farmers of the Interstate Commerce Act or that it would be tolerated.

Therefore, in view of the language of the parts of the Act, itself above set forth, it is contended:

That so far as the cities of East Liverpool, Steubenville and Wellsville are concerned, the companies operating in the respective cities are *"STREET, SUBURBAN OR INTERURBAN INTRASTATE ELECTRIC RAILWAYS NOT ENGAGED IN THE GENERAL TRANSPORTATION OF FREIGHT, NOR ARE THEY A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION"* and for those reasons do not come within the jurisdiction of the Commission. If, on the other hand, it would be found that the local street railway companies, by virtue of the merger of the present company, have become a part of an interurban interstate electric railway, it is then contended that it would not come within the jurisdiction of the Commission as provided in the Act itself, because *it is not operated as a part of a general steam railroad system of transportation nor is it engaged in the general transportation of freight.*

It is the contention of these cities that the fact that the S. E. L. & B. V. T. Co. had some express or freight business as developed by their testimony that it was not of such a degree or character that it would be termed *"the general transportation of freight."*

Another feature which presents itself in this connection, and which would seem to also be a strong cir-

circumstance and argument, why the Interstate Commerce Commission is without jurisdiction so far as the situations in Steubenville, East Liverpool and Wellsville are concerned, is this:

Assuming that the Commission in this proceeding would have a right to fix the rates so far as the respective cities are concerned in this proceeding, what would be the situation after the franchises, under which the company is now operating, had expired? Certainly, if the Commission had jurisdiction to fix rates, it should have jurisdiction and authority to perpetuate the company. Yes, it is doubted if anyone would seriously contend that the Commission could go so far.

It must be conceded that such rights rest within the cities thru which the company operates, and to divide up the powers and authority over the companies such as the traction company seeks to do in this proceeding would result in unusual confusion.

The Supreme Court of the United States in 230 U. S.—324 in the OMAHA case has fully set forth that the I. C. C. has no jurisdiction of street railways and has defined what they are so far as the Commission is concerned. It is claimed by the cities in this proceedings that the situation in the case at bar so far as the Municipalities are concerned would bring them within rule of this OMAHA case. Also the case of in re "AVON BEACH AND SOUTHERN RAILWAY; 16 O. D. (N. P.), 87 and the case of *Ohio vs. The Dayton Traction Company,* 18 O. C. C., 490, both of which are set forth in Part V-D of this Brief, throw considerable light on the

contention of the cities. The latter case established the rule in Ohio that a street railway, as one of its corporate powers has a right to carry freight. Therefore, under that rule, even tho it were conceded that the local railways in Steubenville, East Liverpool and Wellsville did carry some freight (which is denied by the cities), even then the Commission would be without jurisdiction in the premises.

The Transportation Act of 1920 should be construed as giving jurisdiction to the Commission in fixing the rates, fares and charges of street car companies as set forth in this proceeding, then the act is unconstitutional.

As touching this case, the power conferred upon Congress, Article 1, Section 8, Paragraph 3, of the Constitution of the United States is thus stated:

> "To regulate commerce with foreign nations, and *among the several States* and with Indian tribes."

By paragraph 18, of the same Section and Article, Congress is given power

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of United States, or in any department or officer thereof."

No power is given to Congress to go into and regulate the *internal affairs of any state or political subdivision thereof;* but, on the contrary, other provisions of the Constitution expressly forbid such action.

Article 10 of the Articles of Amendment adopted at the first session of the first Congress held on March 4th, 1789, reads as follows:

> "The powers not delegated to the United States by the Constitution nor prohibited to it by the States, *are reserved to the States respectively or to the people.*"

The right to control its own internal affairs is a high (sovereign power of the individual State, and within this domain the jurisdiction of the State is as complete and conclusive as is that of the Federal Government in the regulation of commerce among the States.

This proposition has been stated and re-affirmed by the Supreme Court on numerous occasions. One of the last cases that reiterates this proposition is entitled *"THE ILLINOIS CENTRAL RAILROAD COMPANY vs. THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS, ET AL.*, 245 U. S., 493. (Decided January 14th, 1918) on page 510, the Court says:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, *and except so far as, its purpose to do so is clearly manifested.*"

Among the powers thus expressly reserved to the States is the Police Power, and the power to make rates and to prescribe other regulations for railroads and utilities comes within the police power of a state.

This proposition also has been affirmed in numerous United States Supreme Court decisions. Among these decisions being that of the case of *in re "RAHRER,"* 140 U. S., page 540, and also the case of *Southern Carolina vs. United States*, 199 U. S., 437.

In the case of *Cleveland Telephone Company vs. The City of Cleveland*, in 98 O. S., 358, the same proposition was set forth by the Supreme Court of Ohio.

This particular question has been also raised before in other cases, and this Brief will not be encumbered by giving any further references or citations to it, excepting to state in conclusion that it is the belief that the Transportation Act of 1920 has not attempted to confer upon the Interstate Commerce Commission the power here claimed by the S. E. L. & B. V. T. Co.—but if it should be found that there is such jurisdiction, then it is most earnestly contended by these cities that such an attempt is clearly beyond the Constitutional power of any Congress to enact.

The fourth point raised by the Municipalities is the fact that, assuming for the sake of argument, that there is jurisdiction in this Commission to enter a change in the fares, rates or charges in the cities of Steubenville, East Liverpool and Wellsville, then *there is no evidence or at least not sufficient evidence in the record to justify such an order.*

The Commission, in its order issued in this case sets forth that an investigation be instituted to determine the reasonableness of the petitioner's interstate rates, and whether or not an *"undue or unreasonable advantage. Preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, etc.,"* if any, be found to exist.

If there is any relief at all, to which the traction company is entitled in this proceeding, or if any order or change of any kind so far as the rates in Wellsville is concerned, should be given, it is the earnest belief of the city that it could only be as a result of a finding on the part of the Commission that there was an undue, unlawful and unjust discrimination against interstate commerce in favor of intrastate commerce.

It is submitted that the company did not even attempt to introduce any evidence showing such a discrimination, but seemed content to make their case on the basis of mere *difference in rates* as set forth in I. C. C. #8. In other words, it is the same question which has been before the Commission so frequently within the recent year. It is the same question as to whether or not unjust and unlawful discrimination and undue burden are one and the same thing. The Examiner in this proceeding certainly gave the company every opportunity to establish discrimination if there was any, and, in the testimony herein referred to, it will be so observed.

The witnesses for the company and their attorneys either could not or did not desire to introduce evidence on this point—they seemed content to rest their case almost exclusively on the fact that they needed Revenue and that they could not continue to operate unless they were given relief. It is an attempt to get from the Interstate Commerce Commission relief which they claim they have been unable to obtain from any other source.

It seems to have been the Traction Company's whole theory that a showing of differences in rates and the need of additional revenue would be sufficient to substantiate the charge of unjust, discrimination and clothe the Commission with the power to permit (and in effect order) an advance in its intrastate rates.

The real question involved, as the city in this Brief understand the law, is not whether the company charges a different rate on one part of its line than on another, but whether, by reason of the difference in its charges, an undue and unreasonable prejudice is created against one party or locality, that is a source of undue and unreasonable advantage to another party or locality to be favored.

The question of discrimination has so many times been before the Commission that numerous decisions have been rendered by it upon that question, and for that reason a number of these decisions and excerpts therefrom have been collected and are set forth in this Brief, to which attention of this Honorable Court is respectfully called. In the same part of this Brief the

SHREVEPORT case is also set forth. That is the case which is so frequently relied upon by carriers, to justify an increase in intrastate rates. It is submitted to this Court, however, that the case at bar certainly does not come within the purview of the SHREVEPORT case. In the latter case an actual discrimination as to the rates, places and localities therein set forth was attempted to be made.

When the Transportation Act of 1920 was being considered by Congress, the words *"UNDUE BURDEN"* were stricken out by the Committee and in their place was written the words *"UNDUE, UNREASONABLE AND UNJUST DISCRIMINATION,"* also decisions are shown at that point that there is authority in construing the law to make reference to such proceedings. We claim that when Congress struck out the words *"UNDUE BURDEN"* from this Act, it reaffirmed the rule which had already been established by the Commission itself, and, by the United States Supreme Court decisions, that an *actual unlawful discrimination* against *interstate* commerce, and in favor of intrastate commerce had to be established before the Commission could take jurisdiction.

In view of the above, it is most earnestly insisted that the traction company has failed to make out a semblance of a discrimination case that would entitle them to any relief whatsoever, and, that if for no other reason, than that, it is the sincere belief of the cities that the Commission could not make any kind of an order which would change the rates, fares or charges in vogue, in the cities of Steubenville, East Liverpool

and Wellsville, under their respective franchise Ordinances.

It might be stated in this connection that the mere fact that there is a difference in rates as set forth by the traction company, in itself, does not mean anything. The evidence has clearly set forth that there are different cars, different schedules, different tracks, etc., on the local and the so-called interurban line and for that reason, there being a difference in service and accommodations, a difference in rates would not necessarily be unjustifiable. As a matter of fact, the people traveling on one car or line receive more service and accommodation than those traveling in other cars and parts of the company's line.

The able opinion of the lower Court in this case has been reported in case *The City of Wellsville vs. The United States*, 278 Fed. Rep., 769; *The City of Hubbard vs. The United States*, 278 Fed. Rep., 754, to which we respectfully refer.

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